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Opinion following order vacating prior opinion

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re the Marriage of ARTHUR and POLINA TSATRYAN.	B269812 (Los Angeles County Super. Ct. No. BD512645)
ARTHUR TSATRYAN, Appellant, v. POLINA TSATRYAN, Respondent.	

APPEAL from orders of the Superior Court of Los Angeles County, Mark A. Juhas, Judge. Affirmed.

Arthur Tsatryan, in pro. per., for Appellant.

No appearance for Respondent.

This is the sixth appeal by Arthur Tsatryan in this marital dissolution action. His most recent appeal was from the judgment of dissolution, which we affirmed. (*In re Marriage of Tsatryan* (Feb. 13, 2018, B265467) [nonpub. opn.].) Arthur[1] now appeals from two orders denying his requests to vacate the judgment, raising numerous challenges on the merits. However, as to the first request filed on November 23, 2015, because Arthur failed to serve his former spouse Polina with his request to vacate the judgment, the trial court lacked jurisdiction to consider his request. As to his second request filed on March 14, 2016, the trial court properly denied the request because it was an untimely motion for reconsideration of the earlier denial, which the trial court had considered on the merits. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *The Marital Dissolution Proceedings*

Arthur and Polina were married on August 5, 1987. They separated on August 3, 2009, and Arthur filed a petition for dissolution of marriage on September 23, 2009. Arthur and Polina have three sons, including Alexander, who was a minor at the time Arthur filed for dissolution.

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1 As with our previous opinions in this matter, we refer to Arthur and Polina Tsatryan by their first names for the sake of convenience and clarity, intending no disrespect.

2 In our discussion of the factual and procedural background of the case, we focus on the proceedings relevant to this appeal. We discuss the earlier proceedings leading up to the judgment of dissolution in *In re Marriage of Tsatryan* (Nov. 9, 2016, B262680) (nonpub. opn.).

Following a three-day trial, on February 11, 2015 the trial court awarded Polina sole legal and physical custody of Alexander, with limited visitation by Arthur. Arthur appealed, and we affirmed. (*In re Marriage of Tsatryan* (Nov. 9, 2016, B262680) [nonpub. opn.].) The trial continued on April 2 and 3, 2015 with respect to division of the parties' property, child and spousal support, and other reserved issues. On May 21, 2015 the trial court issued its ruling and entered a judgment of dissolution. The trial court ordered Arthur to pay child support and denied Arthur's request for spousal support. The trial court found the parties' Santa Clarita property was community property and ordered the property be sold and the proceeds divided evenly, subject to equalization payments. The trial court also awarded Polina attorney's fees. Arthur again appealed, and we affirmed. (*In re Marriage of Tsatryan, supra*, B265467.)

B. *Arthur's November 23, 2015 Request To Vacate the Judgment*

On November 18, 2015 Arthur filed a notice of intent to take oral testimony at a hearing scheduled for January 8, 2016. He sought to examine the custodian of records for the County of Los Angeles, regarding payments and benefits paid to Polina during her employment; Polina, regarding her "fabrication and forgery of documents" and her financial condition since the separation; and Polina's attorney, Steven Fernandez, regarding his fabrication and forgery of documents and "fraud, deceiving and frivolous litigation." Arthur also intended to testify regarding the fraudulent activities of Polina and her attorneys.

On November 23, 2015 Arthur filed a request to vacate the judgment, setting the hearing for January 8, 2016.[3] Arthur based his request on Code of Civil Procedure section 657, subdivisions 1, 3, 4, 5, 6, and 7,[4] and Family Code sections 2030 and 2032.[5] Specifically, he claimed the trial court denied him access to an

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[3] Arthur previously filed a motion to vacate the judgment on June 15, 2015, pursuant to Code of Civil Procedure section 657, subdivisions 1, 5, 6, and 7. However, the record does not show what action, if any, was taken on the motion, which is not before us on appeal.

[4] All further undesignated statutory references are to the Code of Civil Procedure. Section 657 provides that a verdict or other decision "may be modified or vacated . . . for any of the following causes, materially affecting the substantial rights of [a] party: [¶] 1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. [¶] . . . [¶] 3. Accident or surprise, which ordinary prudence could not have guarded against. [¶] 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. [¶] 5. Excessive or inadequate damages. [¶] 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law. [¶] 7. Error in law, occurring at the trial and excepted to by the party making the application."

[5] Family Code sections 2030 and 2032 govern an award of attorney's fees in a dissolution action. Under Family Code section 2030, subdivision (a)(1), the trial court "shall ensure" that all parties have access to legal representation and, when "necessary based on the income and needs assessments," order one party to pay for the attorney's fees incurred by the other party.

attorney; insufficient evidence supported the judgment; Polina failed to provide her tax returns in discovery; there was newly discovered evidence that Polina "perjured herself [in] all of her Income and Expense Declaration[s] and greatly reduce[d] her income, benefits and compensations"; the trial court admitted third party deposition testimony offered by Polina; the trial court gave no weight to Arthur's witnesses; and the trial court ignored statutory and case law in rendering the judgment.

On November 24, 2015 Arthur filed a proof of service, stating Arthur's request to vacate the judgment and notice of intent to take oral testimony were served by mail on Fernandez at 429 Santa Monica Boulevard, #120, Santa Monica, CA 90401 (Santa Monica address) by Alexander Galstyan.

On December 30, 2015 Arthur filed a notice of nonopposition to his request to vacate the judgment. The proof of service stated Fernandez was served at the Santa Monica address. According to Arthur's supporting declaration, the envelope containing his request to vacate the judgment and notice of his intent to take oral testimony was addressed to Fernandez, and was later returned to Arthur unopened. A copy of the envelope was attached to Arthur's declaration. According to Arthur, the post office told him the law firm had its own "return to sender" stamp, which was different from the stamp the post office used.

C. *The Hearing on Arthur's November 23, 2015 Request To Vacate the Judgment*

At the January 8, 2016 hearing, Fernandez stated that although the Santa Monica address on the envelope was correct, he never received the request to vacate. He added that pursuant

to Family Code section 215, "it's improper service anyway even if it's mail. But I never received it." The trial court agreed, stating, "[A]ccording to Family Code section 215, after entry of judgment, no modification of the judgment or order is valid unless any prior notice is served. Whether it's personally or not, it has to be served on her, not on the attorney of record."[6]

The trial court additionally found no "support in the law to set aside a judgment based on [Family Code sections] 2030 and 2032 because you didn't get attorney's fees." But the court noted the "main problem with the motion is [its] timeliness." The court added, "So there's a bunch of different problems here. One, under [section] 657, this isn't a timely request. Secondly, under Family Code section 215, service is inappropriate. And, third, even if [section] 657 was appropriate, number 4 says, 'which the party could not, with reasonable diligence, have discovered and produced at trial.' There's no indication this information was suddenly just available."

Arthur responded that "[w]hat it really looks to me right now like the court try to cover up [Polina] again." The court allowed Arthur to argue the merits of his request. Arthur asserted he recently learned from a Web site on government employee salaries that Polina had underreported her income.[7]

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[6] Family Code section 215, subdivision (a), provides that following a judgment of dissolution, notice of a request for modification of the judgment or other order must be served on the party, not the attorney of record.

[7] Exhibit 1 to Arthur's request was a computer printout from a "FindTheData" Web site showing Polina's salaries for the years 2011 through 2013. (<http://state-employees.findthedata.com/d/a/Polina-Tsatryan>, as of Nov. 11, 2015.)

He added he had just discovered this "by accident." Arthur also complained that he had to represent himself because he was ordered to pay Polina's attorney's fees, and she never produced her tax return. Arthur noted there was no opposition to his request to vacate the judgment, and he objected to Polina and her attorney being present at the hearing. The trial court overruled this objection.

The trial court found Arthur's request was untimely under section 657 because it was not filed within 15 days of mailing of the notice of entry of judgment or 180 days after entry of judgment, whichever is earlier.[8] The trial court alternatively found the request was untimely even if it were treated as a motion for reconsideration under section 1008, which must be filed within 10 days after service (§ 1008, subd. (a)), or a motion to set aside the judgment under section 473, which must be filed within six months after entry of the judgment (§ 473, subd. (b)).[9]

However, the trial court noted Arthur's request was timely under Family Code section 2121, which allows the judgment to be set aside for fraud if the court finds "that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief." The trial court found Arthur's request was filed

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[8] The trial court correctly set forth the time limits under section 659, subdivision (a)(2), for filing a motion to vacate a judgment. Arthur filed his request on November 23, 2015, approximately six months after mailing by the clerk on May 21, 2015 of the notice of entry of judgment. Arthur does not contend otherwise.

[9] Arthur did not argue the judgment was void under section 473, subdivision (d).

within one year of the date of discovery, as required by Family Code section 2122.[10]

Arthur relied on two exhibits to his request to vacate the judgment—exhibit 1 printed from a Web site showing Polina's base salary for 2013 at $73,319 and total compensation at $106,376, and Polina's August 2013 income and expense declaration, attached as exhibit 4, that showed Polina's yearly income at $73,457.04 per year. The trial court pointed out that the base salary on exhibit 1 of $73,319 was comparable to the yearly salary she reported on her income and expense declaration.[11] Arthur responded that exhibit 1 also showed Polina's total compensation was $106,000, and argued this amount would affect the court's child support award.

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[10] Family Code section 2121, subdivision (a), provides for relief from a judgment in a dissolution proceeding "adjudicating support or division of property, after the six-month time limit of Section 473 . . . has run . . . ." Family Code section 2121, subdivision (a), provides that a motion based on fraud must be brought within one year after the date the complaining party discovered or should have discovered the fraud. However, under subdivision (b), "before granting relief, the court shall find that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief." Family Code section 2122 sets forth the grounds for relief, including actual fraud and perjury.

[11] The trial court orally calculated Polina's yearly salary as reported on her income and expense declaration as $73,452 based on her stated monthly income of $6,121.42. With the benefit of a calculator, we note that Polina's yearly salary as reported was $73,457.04.

The trial court concluded Arthur had not shown under Family Code section 2121, subdivision (b), "that the facts alleged as the grounds for relief materially affect the original outcome and that the moving party would materially benefit from the granting of the relief." The court stated, "[T]here's no indication as to what the difference between the base salary and [Polina's] total compensation is. And so the fact that, for example, if she has matching 401(k)s and some other things, . . . that wouldn't go into the guideline numbers in any event. [¶] And so there's insufficient evidence to show that there's a material difference. So I'm going to deny it."[12]

The court signed and filed an order denying Arthur's request to vacate the judgment. Arthur timely appealed.[13]

D. *Arthur's March 14, 2016 Request To Vacate the Judgment*

On March 14, 2016 Arthur filed a third request to vacate the judgment. Arthur served this request on Polina and her attorney Fernandez. Arthur based the request on the same Code

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[12] The trial court did not allow the witness from the County of Los Angeles to testify because Arthur failed to serve Polina with a notice to consumer, as required by sections 1985.3 and 1985.6. The court made a finding of good cause to refuse to allow live testimony from other witnesses, finding credibility was not an issue. (See Fam. Code, § 217, subd. (b).)

[13] Tsatryan has filed a proof of service of the notice of appeal, showing service by mail on Fernandez at the Santa Monica address. Polina has not filed a respondent's brief. On December 22, 2016 this court received a copy of the trial court's November 7, 2016 order granting Fernandez's motion to be relieved as counsel. Pleadings after that date, including notices from this court, have been served on Polina.

of Civil Procedure and Family Code provisions as his November 23, 2015 request, but also on Family Code sections 2120, 2121, 2122, 3121, and 3691.[14] Arthur repeated his arguments that Polina failed to provide her tax returns in discovery; there was newly discovered evidence that Polina perjured herself in her income and expense declarations; the trial court denied him access to an attorney; the trial court gave no weight to Arthur's witnesses; and the trial court ignored statutory and case law in rendering the judgment. Arthur filed as exhibits Polina's pay records from January to December 31, 2014 and a Web site printout showing Polina's "regular pay" in 2015 was $76,371 and her total pay including benefits was $113,442. Arthur also attached as an exhibit a copy of Polina's February 27, 2015 income and expense declaration, reflecting yearly income of $80,551.80.

On March 25, 2016 Arthur filed a supplemental declaration attaching his February 27, 2015 income and expense declaration, his 2014 income tax returns, the trial court's child and spousal

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[14] Family Code sections 2120, 2121, and 2122 address the grounds and time limits for a spouse's request for relief from a judgment adjudicating support or division of property. Family Code section 3121, subdivision (a), addresses a spouse's access to legal representation in actions for child custody and child support. Family Code section 3691, subdivisions (a) and (b), provide that a motion to set aside a support order based on actual fraud or perjury must be brought within six months after the date on which the spouse discovered or reasonably should have discovered the fraud or perjury.

support calculations, and Arthur's support calculations. On April 12, 2016 Arthur filed a responsive declaration.[15]

At the April 20, 2016 hearing, the trial court heard argument on whether Arthur's request was timely. Arthur argued his request was timely because Polina obtained the judgment by perjury and fraud. The trial court responded, "You've done this before, though." Arthur replied, ". . . I didn't do it before, because it's completely different. And even though I did it before, I'm still in one year of limitation statute. One year didn't pass from time I discovered it. Because even after [the] court . . . compelled her to provide her income tax return, she refuse[d] it." Polina's counsel responded, "This is exactly the same as the second motion to vacate the judgment . . . ." Further, "there are no new facts. It's a disguised motion for reconsideration. It's untimely under the motion for reconsideration statutes." Arthur argued the request to vacate was different because he now argued that Polina's total pay with

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[15] Arthur has not included in the appellate record Polina's declaration or memorandum of points and authorities in opposition to Arthur's request to vacate. Both are referenced in Arthur's responsive declaration. Arthur states in his opening brief that Polina "did not provide it as the records for Appellate Court." But it was Arthur's obligation as the appellant to provide an adequate record on appeal. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141 ["'Because [the appellant] failed to furnish an adequate record of the attorney fee proceedings, [the appellant's] claim must be resolved against [him].'"]; *Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 935 ["Failure to provide an adequate record on an issue requires that the issue be resolved against appellant."].)

benefits in 2014 was $113,442. The court took the matter under submission.

On April 27, 2016 the trial court denied Arthur's March 14, 2016 request, without stating its reasons. Arthur timely appealed.

DISCUSSION

A. *Arthur's Appeal of Denial of His November 23, 2015 Request To Vacate the Judgment*

The trial court denied Arthur's request in part on Arthur's failure to serve Polina with his request to vacate the judgment. The trial court was correct. Family Code section 215, subdivision (a), provides: "Except as provided in subdivision (b) or (c), after entry of a judgment of dissolution of marriage, . . . no modification of the judgment or order, and no subsequent order in the proceedings, is valid unless any prior notice otherwise required to be given to a party to the proceeding is served, in the same manner as the notice is otherwise permitted by law to be served, upon the party. For the purposes of this section, service upon the attorney of record is not sufficient."

Arthur does not dispute on appeal that he failed to serve Polina with his request to vacate the judgment. "Respondent's failure to serve appellant with notice of the [postjudgment] motion is the equivalent of failure to serve summons and complaint, which renders a judgment void on its face and subject to collateral attack at any time." (*In re Marriage of Kreiss* (1990) 224 Cal.App.3d 1033, 1039-1040 [interpreting statutory predecessor to § 215]; accord, *In re Marriage of Roden* (1987) 193 Cal.App.3d 939, 943 [order for continued spousal support

invalid where party served opposing counsel instead of party, interpreting predecessor statute to § 215].)

By failing to address this issue in his opening brief, Arthur has forfeited any argument that Polina was properly served, or that she waived the failure to serve her by her appearance with her attorney at the hearing.[16] (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 ["Plaintiff has not raised this issue on appeal, however, and it may therefore be deemed waived."]; *Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1136 [appellant forfeited challenge to issue not raised on appeal].)

B. *Arthur's Appeal of Denial of His March 14, 2016 Request To Vacate the Judgment*

Arthur fails to address in his opening brief whether, as argued by Polina's counsel at the hearing, his third request to vacate the judgment was untimely as "a disguised motion for reconsideration." It was. As the trial court noted at the hearing when Arthur argued the judgment should be vacated because Polina perjured herself in reporting her income, "You've done this before, though." Indeed, in his November 23, 2015 request to

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[16] Although some courts have found in limited circumstances a party may waive lack of proper service on the party where the attorney accepted service of an adequate notice (see *In re Marriage of Roden, supra*, 193 Cal.App.3d at p. 944; *In re Marriage of Askren* (1984) 157 Cal.App.3d 205, 211), here Fernandez did not accept service and appeared at the hearing to object to improper service. Further, it is undisputed that Fernandez did not have actual notice of Arthur's request until he received the notice of nonopposition.

vacate, Arthur argued Polina's total compensation was $106,000, including benefits, as reflected on a Web site printout, instead of the $73,457.04 reflected on her 2013 income and expense declaration. Arthur asserted the same argument in his March 14, 2016 request to vacate, this time arguing Polina's total compensation in 2014 was $113,442 according a Web site printout, as compared to the $80,551.80 income reflected on her February 27, 2015 income and expense declaration.

Although the two requests focused on different calendar years, Arthur's argument was the same—Polina perjured herself by including her base salary on her income and expense declarations instead of her total compensation, including benefits. As discussed, the trial court rejected this argument in denying Arthur's November 23, 2015 request, stating, "[T]here's no indication as to what the difference between the base salary and [Polina's] total compensation is. And so the fact that, for example, if she has matching 401(k)s and some other things, . . . that wouldn't go into the guideline numbers in any event. [¶] And so there's insufficient evidence to show that there's a material difference."[17]

By making the same argument for vacating the judgment in his March 14, 2016 request, Arthur was seeking reconsideration of the trial court's earlier ruling based on new

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[17] The other contentions Arthur raised in his March 14, 2016 request were identical to those asserted in his November 23, 2015 request, including that the trial court denied him access to an attorney; the trial court gave no weight to Arthur's witnesses; and the trial court ignored statutory and case law in rendering the judgment.

facts, that is, Polina's 2014 income.[18] "'The name of a motion is not controlling, and, regardless of the name, a motion asking the trial court to decide the same matter previously ruled on is a motion for reconsideration under . . . section 1008.'" (*J.W. v. Watchtower Bible & Tract Society of New York, Inc.* (2018) 29 Cal.App.5th 1142, 1171, review filed Jan. 22, 2019, S253669 [treating motion for relief from terminating sanctions as motion

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[18] Although we affirm the trial court's denial of Arthur's November 23, 2015 request to vacate the judgment based on Arthur's failure to serve Polina with his request, the trial court heard argument of counsel at the hearing and denied the request on the merits. The trial court did not abuse its discretion in concluding as to Arthur's November 23, 2015 request to vacate that the information provided by Arthur did not show whether the total compensation included matching 401(k) retirement contributions or other income that would not be considered in calculation of child and spousal support, and therefore did not support vacating the judgment. (See *In re Marriage of Walker* (2012) 203 Cal.App.4th 137, 146 ["We review the family court's ruling [under Family Code section 2122] for abuse of discretion."]; *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1346 ["We review the trial court's decision in ruling on the motion to set aside the judgment . . . to determine if the trial court abused its discretion."]; see also Fam. Code, § 2121, subd. (b) [requiring that trial court find "facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief"].) To the extent the trial court denied the March 14, 2016 request to vacate the judgment on the same basis, it similarly was not an abuse of discretion. As to other issues raised in Arthur's March 14, 2016 request, as discussed, we do not have a complete record on which we can consider Arthur's contentions because we do not have Polina's declaration setting forth the factual basis for her opposition.

for reconsideration]; accord, *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1577 [treating motion to set aside dismissal of action for lack of prosecution as motion for reconsideration].) Unless the time deadlines for a motion for reconsideration are applied, Arthur could file multiple requests to vacate the judgment based on the same argument regarding the disparity between Polina's "total compensation" and the income she reported on her income and expense declaration, each time pointing to a different income and expense declaration. But that is precisely what section 1008 is designed to prevent, limiting a party to a single motion for reconsideration within the time limits set by statute.

Specifically, section 1008, subdivision (a), provides that "any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order." Notice of the trial court's January 8, 2016 denial of Arthur's November 23 request to vacate was mailed on January 19, 2016. Arthur had notice of the denial as shown by his filing of a notice of appeal on January 20, 2016. Thus, Arthur's request was untimely, and was properly denied.[19]

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[19] We deny Arthur's January 3 and April 19, 2017 requests for judicial notice of documents missing from the court file as unnecessary to our resolution of this appeal. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [judicial notice denied where "the requests present no issue for which judicial notice of these items is necessary, helpful, or relevant"]; *Appel v. Superior Court* (2013) 214 Cal.App.4th 329, 342, fn. 6 [judicial notice denied where

In addition, because Arthur only appealed from the trial court's January 8, 2016 and March 14, 2016 denials of his requests to vacate the May 21, 2015 judgment, we do not have jurisdiction to consider Arthur's challenges to the trial court's June 30, 2011 and June 4, 2012 denials of his requests for attorneys' fees, Polina's asserted discovery violations, and the trial court's failure on September 16, 2014 to find Polina in contempt, as urged by Arthur. (*Faunce v. Cate* (2013) 222 Cal.App.4th 166, 170 ["We have no jurisdiction over an order not mentioned in the notice of appeal."].)

DISPOSITION

The orders are affirmed. Appellant is to bear his own costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J. ZELON, J.

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materials are not "relevant or necessary" to the court's analysis]; *San Diego City Firefighters, Local 145 v. Board of Administration etc.* (2012) 206 Cal.App.4th 594, 600, fn. 3 [judicial notice denied because "the document at issue is not necessary to our resolution of this appeal"].) We note the request to take judicial notice does not address the failure to include in the record Polina's declaration and opposition to Arthur's March 14, 2016 request to vacate the judgment.